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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 452

RICHARD JEWELL NEWLAND,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions	2
Statement of Case	6
Summary of Argument	7
Argument	7
Conclusion	10

CITATIONS AND AUTHORITY

Cases:	Page
Fay v. Noia, 372 U.S. 391	9, 10
Johnson v. Zerbst, 304 U.S. 458	9
Lane v. Brown, 372 U.S. 391	9
Newland v. State, (1968) 236 N.E. 2d 45	8
Amendment 14, § 1, United States Constitution	2
Rule 2-40, Indiana Supreme Court	2, 7
Rule 2-40a, Indiana Supreme Court	4

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OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 236 N. E. 2d 45.

JURISDICTION

While the jurisdictional requisites are adequately set forth in the petition, Respondent will contend that this court should not assume jurisdiction because the judgement complained of was based on separate and independent state grounds.

QUESTIONS PRESENTED

Whether requiring a petitioner to show due diligence in petitioning for a belated motion for a new trial is a violation of his constitutional rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment 14, § 1 of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Rule 2-40 of the Indiana Supreme Court

> **Grounds for writs of error coram nobis shall be included in motion for a new trial.**—Hereafter no court shall have jurisdiction to entertain any action for a writ of error coram nobis in any criminal case, but the remedy heretofore granted in such a proceeding shall hereafter be obtained solely through a motion for a new trial in the case out of which the cause therefore is alleged to have originated. Each ground shall be separately specified in the motion for a new trial, and any ground or error not so specified shall be considered waived.
>
> Trial counsel representing a defendant or the defendant pro se shall, in all cases where meritorious grounds exist therefor, file a motion for a new trial within the time prescribed by the rules of this court. If no timely motion for a new trial is filed by a de-

fendant's trial counsel or by the defendant pro se, it may be considered as evidence by the court that no meritorious grounds exist for a new trial or for an appeal, or if any meritorious grounds did exist, there is an acquiescence in, and an acceptance of, the judgment of the trial court by the defendant.

Time limitations with reference to motions for a new trial shall be applicable hereto. Provided, however, if the moving party first obtains knowledge of an alleged ground after the time within which a motion for a new trial may be filed, such party may file a petition requesting permission to file a belated motion for a new trial, which motion shall be attached to said petition. Not more than one [1] belated motion for a new trial in the same case may be entertained or considered by a court unless the subject matter of the action had not come or could not come by the exercise of diligence to the knowledge of the petitioner at the time of the filing of such belated motion for new trial. The petition (for a belated motion for a new trial) must be personally verified by the party, specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause, and why such cause could not have been discovered before by the exercise of due diligence. The court, upon finding substantial evidence of such facts, and that the movant acted as promptly as reasonably possible, shall approve the filing of said belated motion for a new trial.

The attorney-general of the state of Indiana and the prosecuting attorney of the judicial district wherein such petition is filed shall be given notice of the filing of the petition and thirty [30] days' time within which to answer same. A copy of the petition shall be served with the notice.

In the event a belated motion for new trial is filed in forma pauperis, it shall be the duty of the

public defender of the state of Indiana to represent the petitioner in said proceedings, if he, after diligent inquiry, finds merit thereto, subject, however, to the provisions of Rule 2-40A infra.

Affidavits may be filed with and in support of or in opposition to petitions for belated motions for new trial and motions for new trials and shall be considered as evidence without introduction thereof. The court may hear additional evidence at its discretion. The petition and affidavits filed in support thereof or in opposition thereto shall be a part of the record without a bill of exceptions. The parties thereto shall not be entitled to a change of venue from the county or change of judge.

This rule shall be applicable only to criminal proceedings. (Adopted May 29, 1945, in State ex rel. Emmert v. Hamilton Circuit Court, 223 Ind. 418, 61 N. E. (2d) 182; amended and in force Dec. 20, 1952; amended and in force Sept. 11, 1963.)

3. Rule 2-40a of the Indiana Supreme Court.

Review by certiorari.—Rulings on petitions to file belated appeals, ruling on petitions to file belated motions for a new trial and rulings on belated motions for a new trial (when because of the expiration of time it is impossible to incorporate the alleged errors in a regular appeal in the original criminal case), may be reviewed only on petition for writ of certiorari in the Supreme Court of this state.

A petition for a writ of certiorari shall be verified, shall set forth specifically the grounds therefor and may be supported by a brief. A copy of the petition and brief shall be served on the attorney-general at the time of filing. To this petition the attorney-general shall file a response under oath admitting, denying or stating additional facts (by affidavit or otherwise) pertaining to the issue involved, to-

gether with brief in support thereof. If there is a conflict as to the statement of the record below, this court may direct the clerk below to prepare a certified copy of that portion of the record in dispute and file the same in this court.

If the conflict concerns the evidence, the trial court may be directed to recite in narrative form the evidence pertinent to the issue and certify to the same as a bill of exceptions containing all of the evidence pertaining to the issue involved.

It shall be the duty of the public defender of the state of Indiana to represent indigent persons who are inmates of penal institutions of the state of Indiana after their time for regular or timely appeal has expired, if requested so to do, in the filing of petitions for delayed appeals, petitions for belated motions for a new trial, and petitions for writs of certiorari if he, after diligent inquiry, finds any grounds upon which to sustain such proceedings. In the event of the failure or refusal of the public defender to represent any petitioner in such cases (as provided in Rule 2-40A, supra), upon petition filed in the clerk's office of the Supreme Court setting up such facts that the public defender has failed or refused to represent them, a citation shall be issued to the public defender by this court to show cause why he does not represent the petitioner, and he shall file his response and report with the clerk of this court, which shall become a part of the record in this cause. Upon due consideration of said response and report, the court shall determine whether or not an order shall issue requiring the public defender to represent the petitioner.

In the event proceedings are in forma pauperis, no costs shall be taxed against petitioner for transcripts, bills of exceptions and certified copies of the record in such case; otherwise the costs shall be taxed as provided by law.

The petition and brief for writ of certiorari shall be filed within sixty [60] days after the ruling complained of, and the response thereto within thirty [30] days after the filing of the petition for the writ. The petitioner may file a reply brief within ten [10] days after the filing of the response. No other briefs or pleadings shall be filed. Six [6] copies of the petition and brief, and response and the reply brief shall be filed with the clerk.

The court may grant the writ if it finds meritorious grounds for a review of the trial court's action exist, and make such order, final or otherwise, as may be appropriate.

Provided further, that where the petition for the writ does not meet with the rules of this court, the same may be denied under the same circumstances, conditions and for the same reasons given, if any, by the United States Supreme Court in denying like petitions.

This rule shall be applicable only to criminal proceedings. (Adopted Sept. 25, 1953, effective in cases filed after Jan. 1, 1954; amended and in force Sept. 11, 1963.)

STATEMENT OF CASE

Petitioner had a review of his conviction by direct appeal. He later filed a petition for permission to file a belated motion for a new trial in the trial court. Petition for permission was granted, a hearing was held and his belated motion for new trial was denied. He then filed his "Second Verified Petition for Permission to File a Belated Motion for New Trial" which was denied. He then filed a petition for writ of certiorari in the Indiana Supreme Court. Certiorari was denied. He then filed a petition for rehearing in the Indiana Supreme Court which was denied.

Petitioner is now appealing the denial of his Petition for Writ of Certiorari by the Indiana Supreme Court.

SUMMARY OF ARGUMENT

Petitioner has presented no constitutional question for review. While he states that Indiana Supreme Court Rules 2-40 and 2-40a do not comply with *Brown* v. *Lane,* he does not show how *Brown* applies to his case.

Rules 2-40 and 2-40a apply alike to pauper petitioners, petitioners represented by the Public Defender and petitioners represented by counsel. These Rules, applied to petitioner, do not constitute a denial of equal protection.

The questions raised in the petition are not directly reviewable by certiorari because they rest on separate and independent state grounds.

ARGUMENT

THE PETITION RAISES NO QUESTIONS FOR REVIEW

Rule 2-40 of the Indiana Supreme Court provides in part:

> "The petition (for a belated motion for a new trial) must be personally verified by the party, specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause, and why such cause could not have been discovered before by the exercise of due diligence".

The trial court denied Petitioner herein permission to file a belated motion for a new trial. He then filed a Petition for Writ of Certiorari in the Indiana Supreme Court to review this decision. In his petition for Writ of Certiorari

in the Indiana Supreme Court, he attached "Second Verified Petition for Permission to File a Belated Motion for New Trial" and denominated it "Petitioner's Exhibit B". The allegations of due diligence contained in his petition for permission to file a belated motion for a new trial were, therefore, before the Indiana Supreme Court when they reviewed the decision of the trial court. In denying the Writ of Certiorari, (the ruling now complained of), the Indiana Supreme Court stated:

> "In a petition for permission to file a belated motion for a new trial, the trial court has discretion in ruling upon the Petition and may be reversed only for an abuse of that discretion, and this rule applies when the trial judge determines whether the Petitioner exercised due diligence in filing the petition. *Barrett* v. *State of Indiana, supra.*
>
> "In the petition for certiorari petitioner has not shown how the trial judge abused his discretion. Furthermore, the petitioner's mere allegation that he, in fact, used diligence is insufficient in the face of the previous determination of the trial judge". *Newland* v. *State* (1968) 236 N. E. 2d 45, 46.

The Indiana Supreme Court denied his petition for the reason that he had not shown that the trial court had committed an abuse of discretion.

It is difficult from reading Petitioner's "Questions Presented" and "Argument" to determine exactly what denial of a Constitutional right is being complained of. He has admittedly had a trial on the merits, with counsel; a direct appeal with counsel and transcript; a hearing on his petition to file a belated motion for new trial, represented by counsel; a review of the denial of his petition for a be-

lated motion for new trial in the Indiana Supreme Court, and a review again on a Petition for Rehearing.

He appears to be trying to bring his case somehow within the proscriptions of the rules of *Lane* v. *Brown*, 372 U.S. 477, *Fay* v. *Noia*, 372 U.S. 391 and *Johnson* v. *Zerbst*, 304 U.S. 458. He fails, however, to show the applicability of these cases to the case at bar.

It is not enough for him to complain, as he does, that Rules 2-40 and 2-40a do not comply with *Lane* v. *Brown*, Even if this were true (which it is not) he must show how *he* was denied some constitional right.

Respondent is not certain what point Petitioner is trying to make in his "Questions Presented" and "Argument". It appears that he is saying that Rule 2-40 denied him equal protection of the law; that there is an invidious discrimination made between petitioners with counsel and pauper petitioners, in favor of pauper petitioners. This idea, while novel, is incorrect. Rule 2-40 requires that *all* petitions for permission to file a belated motion for a new trial must show due diligence in the application. This applies to pro se petitioners and petitioners represented by the Public Defender as well as petitioners represented by counsel.

There is nothing in Rules 2-40 or 2-40a which exempts petitioners represented by the Public Defender from showing due diligence in the petition (see complete text of Rules 2-40 and 2-40a).

Finally, the finding by the Indiana Supreme Court that the petitioner did not show that the trial court had abused its discretion is not properly before this Court for direct review by Certiorari.

In *Fay* v. *Noia*, 372 U.S. 391, 428, this Court stated:

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds."

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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